Americare Pine Lodge Nursing and Rehabilitation Center *and* District 1199, WV/KY/OH, the Health Care and Social Service Union, SEIU, AFL–CIO. Cases 9–CA–33304 and 9–CA–33478

November 8, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On May 24, 1996, Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

The judge found, and we agree, that the Respondent engaged in direct dealing with bargaining unit employees, in violation of Section 8(a)(5) and (1) of the Act. As discussed more fully in the judge's decision, the Respondent engaged in direct dealing in an unsuccessful attempt to obtain acceptance of its proposal of a contract extension and wage increase prior to the expiration of the parties' collective-bargaining agreement. The judge further found that, given its unlawful conduct, the Respondent was not privileged to rely on decertification-type petitions to withdraw recognition from the Union. The Respondent contends, inter alia, that even if its conduct constituted unfair labor practices, the Board is still required to determine whether these ''were serious in nature, lasting in impact and directly affected a large segment of the bargaining unit,'' before finding that it was precluded from relying on the petitions as a basis for withdrawing recognition.

In *Master Slack Corp.*, 271 NLRB 78, 84 (1984), the Board held that, to taint a petition, unfair labor practices ''must be of a character as to either affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself.'' In general, there must be a causal relationship between the unlawful conduct and the petition. See *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996). In determining whether there was a causal relationship between the unfair labor practices and the petition in *Master Slack*, supra, the Board applied the following factors:

> (1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. [Id. at 84.]

Applying these factors to the case here, we find a causal relationship between the Respondent's unfair labor practices and the decertification-type petitions presented to the Respondent. The Respondent engaged in various conduct constituting unlawful direct dealing with bargaining unit employees between July 5 and August 4, 1995.[2] Within 3 weeks after the August 4 vote on the Respondent's proposal, the Respondent received the first decertification-type petition, and it received the last such petition approximately 1 week later. Further, it is clear that the Respondent's direct dealing with bargaining unit employees could have reasonably led those employees to believe that they

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge credited the General Counsel's witness, employee Dorothy Smith, only in part. The Respondent relies on this in arguing that Smith should not be credited regarding the discussion of the wage increase and contract extension proposal between Dietary Supervisor Thomas and Smith which occurred in Smith's car. However, the judge explicitly credited Smith regarding the conversation with Thomas in Smith's car. A trier of fact is not required to accept the entirety of a witness' testimony, but may believe some and not all of what a witness says. *Brinkman Southeast*, 261 NLRB 204 (1982); *Giovanni's*, 259 NLRB 233 (1981); *Maxwell's Plum*, 256 NLRB 211 (1981); and *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950).

[2] In support of the complaint's allegations that the Respondent had engaged in direct dealing with employees, the General Counsel presented, inter alia, evidence regarding an employee meeting held on July 12, 1995, by Dietary Supervisor Thomas. The judge found that at this meeting Thomas solicited employees' input regarding the Respondent's wage offer. In its exceptions, the Respondent argues, inter alia, that the judge's finding was in error. According to the Respondent, Thomas called the meeting after an employee questioned her about the Respondent's proposal and, at the meeting, Thomas merely answered employees' questions. Thus, in the Respondent's view, Thomas was only lawfully responding to employees' questions. We disagree. First, we agree with the judge that the record supports a finding that at the meeting Thomas asked employees about the Respondent's wage offer. Second, assuming arguendo that an employee first raised the topic of the wage increase, it is nonetheless clear that Thomas sought employees' input regarding the increase. No employee requested a meeting—Thomas initiated that. Also, when she could not respond to an employee's concern about anniversary raises, Thomas invited Office Manager Clark to join the meeting so that discussions could continue. Clark, in turn, told employees that further discussions with the Respondent's administrator would be necessary to resolve the issue. Ultimately, Thomas did not merely answer an employee's question but rather sought to begin and maintain a dialogue with employees that would produce employee input about Respondent's wage offer. Indeed, as the judge noted, Thomas was successful in that she and Clark learned of employee concerns—which were forwarded to higher management—about anniversary raises.

could obtain better terms and conditions of employment from the Respondent by rejecting the Union. Such direct dealing, by its very nature, improperly affects the bargaining relationship. See *Detroit Edison*, 310 NLRB 564, 566 (1993). The August 3 letter from the Respondent to the employees was particularly offensive in this respect. By asserting that the Union would prefer a ''big strike'' rather than accept the Respondent's proposal, the Respondent sought to disparage the Union and to drive a wedge between the Union and the unit employees. We also note that much of the direct dealing in this case, including distribution of proposals, memoranda, and fliers, was directed to all of the bargaining unit employees. This is not a case in which an employer is communicating with its employees to encourage their ratification of an agreed-upon contract. Rather, the evidence is quite persuasive that the Respondent's goal was direct dealing with unit employees for the purpose of undermining the Union's authority generally and influencing the employees to reject the Union as their bargaining representative. For these reasons, we find, in agreement with the judge, that the Respondent was precluded from relying on the petitions as a basis for its withdrawal of recognition from the Union.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Americare Pine Lodging Nursing and Rehabilitation Center, Beckley, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

''(b) Within 14 days after service by the Region, post at its facility in Beckley, West Virginia, copies of the attached notice marked ''Appendix.''[15] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 6, 1995.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT bypass District 1199, WV/KY/OH, the Health Care and Social Service Union, SEIU, AFL–CIO, the exclusive collective-bargaining representative of our employees in the following appropriate unit, and deal directly with those employees with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All full-time and part-time service and maintenance employees, employed by us including nurses aides, restorative aides, physical therapy aides, housekeeping employees, laundry employees, maintenance employees and dietary employees, but excluding all LPNs, administrative personnel, office clerical employees, department heads, activities director, RNs, and other professional employees and all guards and supervisors as defined in the Act.

WE WILL NOT unlawfully withdraw recognition from, and refuse to bargain with District 1199, WV/KY/OH, the Health Care and Social Service Union, SEIU, AFL–CIO, the exclusive collective-bargaining representative of our employees in the appropriate unit described above.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain in good faith with District 1199, WV/KY/OH, the Health Care and Social Service Union, SEIU, AFL–CIO, as the exclusive collective-bargaining representative of our employees in the above described appropriate unit, regarding rates of pay, wages, hours of employment, and other terms and conditions of employment for those

employees, and if an understanding is reached, reduce the agreement to writing and execute it.

AMERICARE PINE LODGE NURSING AND REHABILITATION CENTER

Donald A. Becher, Esq., for the General Counsel.
Thomas P. Dowd, Esq. (Littler, Mendelson, Fastiff, Tichy & Mathiason), of Baltimore, Maryland, for the Respondent.
Ms. Teresa Ball, of Huntington, West Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried in Beckley, West Virginia, on February 8 and 9, and on May 17, all in 1996. Upon a charge filed in Case 9–CA–33304 on October 6, 1995,[1] by District 1199, WV/KY/OH, The Health Care and Social Service Union, SEIU, AFL–CIO (District 1199 or the Union), the Regional Director for Region 9 issued a complaint on November 13 against the Respondent, Americare Pine Lodge Nursing and Rehabilitation Center (Americare). Thereafter, upon a charge filed in Case 9–CA–33478, on January 9, 1996, by District 1199, the Regional Director for Region 9 issued his order consolidating cases, consolidated complaint and notice of hearing, dated January 30, 1996. Later, upon a charge filed by District 1199 on February 27, 1996, and an amended charge filed by District 1199 on March 25, 1996, the Regional Director for Region 9 issued a complaint in Case 9–CA–33647 on April 8, 1996. Finally, upon motion of the General Counsel and upon considering Americare's opposition, I ordered the consolidation of the complaint in Case 9–CA–33647 with the consolidated complaint in Cases 9–CA–33304 and 9–CA–33478 and the reopening of the record in these cases for a hearing on the allegations raised in Case 9–CA–33647.[2]

The consolidated complaint, including Case 9–CA–33647, alleges that Americare violated Section 8(a)(1) and (5) of the Act when it bypassed District 1199 and dealt directly with bargaining unit employees, withdrew recognition from District 1199, granted a wage increase to the bargaining unit employees without prior notice to District 1199 and without affording it an opportunity to bargain, and denied District 1199 access to bargaining unit employees at Americare's facility. Americare has denied commission of the alleged unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Americare, I make the following

FINDINGS OF FACT

I. JURISDICTION

Americare, a corporation, operates a nursing home and rehabilitation center at its facility in Beckley, West Virginia, where it annually derives gross revenues in excess of $100,000 from this enterprise. During that same period Americare purchased and received at its Beckley, West Virginia facility goods valued in excess of $15,000. Americare admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that District 1199 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

On June 11, 1991, following a representation election in Case 9–RC–15779, the Acting Regional Director for Region 9 certified District 1199 as the collective-bargaining representative of the 68 Americare employees in the following appropriate unit:

> All full-time and part-time service and maintenance employees, employed by [Americare] including nurses aides, restorative aides, physical therapy aides, housekeeping employees, laundry employees, maintenance employees and dietary employees, but excluding all LPNs, administrative personnel, office clerical employees, department heads, activities director, RNs, and other professional employees and all guards and supervisors as defined in the Act.

In December 1991, District 1199 and Americare entered into a 2-year collective-bargaining agreement. On November 5, 1993, following a decertification election in Case 9–RD–1703, the Regional Director for Region 9 issued a certification of representative to District 1199 as the exclusive collective-bargaining representative of Americare's employees in the appropriate unit described above. Thereafter, the parties entered into a collective-bargaining agreement covering the same bargaining unit, effective from December 9, 1993, until December 7. The collective-bargaining agreement did not contain any provisions for reopening during its term. Article XXXVI of the collective-bargaining agreement provided, in pertinent part: ''This Agreement can be changed only by a written Amendment executed by the parties hereto.''

The issues presented in these cases are whether Americare violate Section 8(a)(1) and (5) of the Act by the following conduct:

1. Bypassing District 1199 and dealing directly with bargaining unit employees by questioning them about and soliciting their support for Americare's contract proposal on wages.

2. Bypassing District 1199 and dealing directly with bargaining unit employees by distributing letters and memoranda soliciting their support for Americare's contract proposal on wages.

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[1] All dates are in 1995 unless otherwise indicated.

[2] In fn. 1 of his brief, the General Counsel, for the first time, moved to amend the consolidated complaint to allege that Americare further violated the Act by making a take-it-or-leave-it offer to Local 1199. Americare as filed its opposition to this motion.

In agreement with Americare, I find that the General Counsel's motion comes too late. Americare filed its brief without having had an opportunity to argue the issue raised by the proffered amendment. Further, Americare is not procedurally entitled to file a reply brief. Therefore, I deny the General Counsel's motion. *United Artists Theatre Circuit*, 277 NLRB 115, 130 (1985).

3. Withdrawing recognition of District 1199 as the exclusive collective-bargaining representative of the unit, effective December 7.

4. Granting a wage increase to the unit employees without giving affording District 1199 prior notice and an opportunity to bargain about the increase.

5. On about February 22, 1996, refusing to continue in effect a term of the expired collective-bargaining agreement by denying District 1199 access to the unit employees at Americare's facility.

B. *The Facts*

On July 5, Steven C. Ronilo, vice president of human resources for Americare's parent, telefaxed a letter and side letter agreement to District 1199 offering an immediate across-the-board hourly increase of 25 cents for level I classifications listed in the collective-bargaining agreement, which included dietary assistants, laundry assistants, housekeeping assistants, and noncertified nursing assistants, and an immediate across-the-board hourly increase of 50 cents for level II classifications, listed in the collective bargaining, which included cooks, maintenance assistants, rehabilitation assistants, restorative nursing assistants, and certified nursing assistants. The proposed agreement also called for a 1-year extension of the other provisions of the current collective-bargaining agreement. In his letter, Ronilo explained that Americare was making its ''very generous wage offer'' to avoid bargaining in December, when Americare would be involved in an annual survey, several other projects and, more important, the marketing of a newly opened subacute unit. Ronilo ended his letter with the expectation that District 1199 would respond ''within the next twelve (12) days.''

Jennifer Jordan, the District 1199 official to whom the letter and proposed agreement were addressed, was on vacation and did not see them until she returned to her office on July 11. Americare's administrator, Sherry Johnson, disseminated Ronilo's letter and proposed agreement to her employees at the Beckley facility. She also posted it at Americare's timeclock.

On or about July 12, Dietary Manager Dreama Thomas invited employees Debbie Burgess, Brenda Elliot, Betty Terry, and at least one other employee named Thelma, to come into Americare's storeroom, which served as Thomas' office. Thomas, an admitted supervisor, asked the assembled employees how they viewed Americare's wage offer. At first, the employees did not respond. Brenda Elliot spoke up, asking about a wage increase on her anniversary date and became upset. Thomas said she did not know much about the wage offer and phoned Office Manager Jackie Clark for help.[3]

Clark joined the discussion in the storeroom. Responding to Elliot's question, Clark stated that Americare's wage offer said nothing about anniversary wage increases. The collective-bargaining agreement covering Elliot and the other unit employees provided for automatic annual individual increases on the anniversary of the employee's hire date. Soon after her encounter with the employees in the storeroom, Clark reported it to Administrator Johnson pointing out the employee interest in the anniversary wage increase.[4]

At another time in July, Dreama Thomas, while on a smoking break with employee Dorothy Smith, in the latter's automobile, asked Smith's opinion of the wage increases proposed in the letter of July 5. Smith replied that it sounded pretty good to her, adding that the only reason Americare was granting it was to get rid of District 1199.[5]

After Jennifer Jordan returned from vacation, she found telephone messages from Americare employees regarding the wage offer of July 5. After responding to those inquiries, she visited Americare's facility on July 14. She learned from discussions with bargaining unit employees that they were not interested in Americare's wage proposal. Instead, the employees favored negotiations covering the grievance procedure, fringe benefits such as vacations and sick leave, and other matters. During Jordan's visit at Americare, on July 14, bargaining unit employees Marilyn Curry, Earlene Hurt, and Deborah Burchess raised the matter of anniversary wage increases. District 1199 did not respond to Americare's offer of July 5.

On or about July 28, Ronilo, on behalf of Americare, sent a second letter to District 1199's Jennifer Jordan. Administrator Johnson had recommended sending the second letter after bargaining unit employees had asked her about anniversary wage increases. Attached to the letter was a proposed agreement repeating the earlier offer, with the addition of anniversary wage increases for the period from August 1 until December 31. In closing, Vice President Ronilo invited a reply within 7 days. The letter, which Administrator Johnson disseminated to all her bargaining unit employees included the following paragraph:

> If you really care about the hard working employees at Americare-Pine Lodge, then you will give them an opportunity to have a secret ballot vote on whether or not to accept this large and very generous wage increase. I honestly believe this proposal is much more than we will be offering if we have to bargain in December 1995.

Neither Jennifer Jordan nor any other representative of District 1199 had raised the issue of anniversary wage increases with Americare. District 1199 did not respond to Americare's second offer.

On July 31, after receiving the second offer, Jennifer Jordan visited the bargaining unit employees at Americare. During her visit, she noticed copies of the same offer laying in the employees' breakroom. Jordan also noticed copies of a memo, dated July 28, from Administrator Johnson to the bar-

[3] I based my findings regarding the first portion of the storeroom meeting on employee Burgess' uncontradicted testimony. In any event, Burgess' credibility was boosted by the fact that at the time she testified, she was an Americare employee. I also noted that she testified in a frank manner.

[4] I based my findings regarding Clark's remarks, upon her frank and forthright testimony. Employee Smith testified that she was at the meeting at which Clark spoke. Clark contradicted Smith in this regard and credibly testified that Smith worked an evening shift and that this meeting occurred in the morning. Dreama Thomas also denied that Smith was present at this meeting. Further, Burgess did not corroborate Smith's testimony. I have therefore rejected Smith's testimony that she was at that meeting.

[5] I based my findings regarding the smoke break discussion of the wage proposal upon Smith's uncontradicted testimony. Thomas testified, in substance, that she might have asked how Smith felt about the proposed 25-cent-per-hour wage increase, but she does not know.

gaining unit employees. The subject of Johnson's memo was Americare's wage proposal of July 5 and as amended by Ronilo in his second offer. The ''attached correspondence'' referred to in the memo was Ronilo's letter and attached wage proposal of July 28. Her message was as follows:

> I have had many employees come to me asking if the wage increase that was offered earlier could be extended or reoffered since the Union did not respond to the previous offer.
>
> I am pleased to announce that the Company has agreed to reoffer this proposal. Also, please note for the employees who were concerned about not getting an anniversary increase, that this is being offered also.
>
> I feel that this is an extremely fair offer for each of you. I urge you to give this proposal serious thought.
>
> I will be holding meetings next week to discuss this more indepth for those who have questions.
>
> Please note in the attached correspondence that the Union must respond to Steve Ronilo, our Human Resource Vice President by 6:00 P.M. on Friday, August 4, 1995, if you want this wage increase.
>
> Thank you for your time and attention to this proposal.

During her visit to Americare on July 31, Jennifer Jordan distributed a flier to bargaining unit employees in response to Vice President Ronilo's suggestion of a secret ballot in his letter of July 28. The flier notified the bargaining unit employees that on August 4, the Union would hold a full membership meeting at which a vote would be taken on Americare's proposal.

Between July 31 and August 4, Sherry Johnson admittedly spoke to anywhere from 10 to 15 bargaining unit employees. In one of these exchanges, Johnson approached employee Dorothy Smith at the latter's workstation, in Americare's kitchen, and asked her opinion of the wage offer. Smith answered that it didn't make any difference to her ''one way or the other.''[6]

During the same timeframe, Johnson came to laundry aide Alice Boggs, in Americare's laundry, and asked her what she thought of the wage proposal. Boggs answered that she did not think much of it. She complained that the laundry employees were getting only a quarter and the aides were getting 50 cents. Johnson explained that the aides received the greater amount because they were certified.[7]

Johnson also questioned employee Cindy Aust during the time period between the issuance of wage proposals and District 1199's meeting of August 4. While Aust was sweeping the dining room at Americare's facility, Johnson asked her how she felt about the 50-cent and 25-cent wage increases. Aust was not enthusiastic and suggested that the proposed wage increases were discriminatory.[8]

Housekeeping/Laundry Supervisor Nancy Cooper asked Aust if she intended to vote for the wage increase. Aust replied no. Cooper wanted to know why. Aust explained that it was insufficient and that she deserved more than 25 cents. Cooper reminded Aust that 25 cents was better than nothing.[9]

Cooper asked housekeeping employee Glass what she thought about the 25-cent wage increase she would be getting and if she would ''sign for it.'' Glass answered that she did not know and would have to think about it. On a few other occasions before August 4, Cooper asked Glass what she thought of the 25-cent wage offer and if she would vote for it.[10]

Following the second wage offer, but before August 4, a message over Americare's intercom summoned nurse assistants to a meeting in Supervisor Pam Meador's office. In addition to Meador, Administrator Johnson and Director of Nursing Norma Todd were present. Nursing assistant, Hurt, testified that ''they just only told me what the Company was offering us, and if we want what the Company . . . was offering us that we needed to go and vote on it.'' Hurt also

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[6] I based my findings regarding Johnson's questioning of Smith upon the latter's testimony. Johnson admitted talking to Smith. Also, in response to a leading question, Johnson denied ever asking employees what they thought of the wage proposal. However, Smith gave her detailed account of their conversation in a candid manner. Further, she gave the testimony before me in Johnson's presence and was in Americare's employ when she testified. These factors persuaded me to credit Smith's testimony in this regard.

[7] Johnson admitted talking to Boggs between July 31 and August 4 about Americare's wage proposal. Johnson also conceded that she initiated discussions about the proposal by asking if the employee had seen the memo Americare. If the employee answered yes, Johnson testified that she asked if the employee had any questions. Johnson denied ever asking for an employee's sentiment toward the proposal. Unlike Boggs, Johnson did not provide a particularized version of their conversation. As Boggs seemed a serious witness trying to provide her best recollection without embellishment, I have credited her version.

[8] Johnson admitted talking to 10 to 15 bargaining unit employees between July 31 and August 4 about Americare's wage offer. However, she denies ever asking employees about their attitude toward the wage offer. Johnson's testimony did not include any specifics about a conversation with Aust.

On cross-examination Aust was candid as she admitted that she wanted District 1199 to represent Americare's employees and that her testimony was designed to assist District 1199 in this regard. However, I recognize that Aust was an Americare employee at the time she testified and that she was under oath. From these circumstances and my impression that she was an ingenuous witness, I have credited her testimony regarding her encounter with Johnson.

[9] According to Supervisor Cooper's testimony, she did not ask any employee anything about Americare's wage offer. Cooper also testified that the only comment she ever heard about the offer came from Aust, and it was favorable. However, in light of Aust's complaint to Johnson that the 25-cent wage offer was unfair to the level I employees, I find it unlikely that Aust would have praised it in conversation with Cooper. I also note that Cooper seemed reluctant to provide information regarding her exchange with Aust. When asked to recall when this conversation occurred, she made no effort to do so. She also seemed to be answering questions on direct examination without making an effort to remember details. In contrast, Aust impressed me as a candid witness giving her best recollection. Accordingly, I have credited her testimony in this regard.

[10] Cooper denied having any conversations with Glass about the contract offer. However given Americare's strong concern about the outcome of the vote on August 4, Cooper's testimony that she did not want to talk to Glass about the proposal because Glass was ''very Union oriented'' does not seem plausible in view of my finding that she talked to Aust, another strong supporter of Local 1199. In any event, Glass seemed to be a candid witness, particularly on cross-examination. Accordingly, I have credited her testimony that Cooper asked her how she felt about the wage offer, and if she would vote for it.

recalled that nursing assistant Reese Thompson asked if he could vote on the offer and that ''they told us everybody could go vote on it.'' Further, Hurt testified that ''they'' said that ''they'' could not grant the wage increases unless the employees voted for it. Finally, Hurt recalled that ''somebody said that's the best offer we're going to get because the Union couldn't do no better.'' However, neither Hurt nor any other witness identified the source or sources of these remarks.

Americare sought to influence the outcome of the vote on August 4 by a series of handbills which it disseminated to bargaining unit employees. The record includes seven examples of these handbills. All seven urged the employees to accept Americare's proposal. Three of the flyers also suggested strongly that the employees stood to lose the proffered wage increases if they held out for collective bargaining in December. The first of the three, carried the following message:

> Why *fish* for the unknown at negotiations?
> You can guarantee yourself a *good catch* right now!
> 25 and 50 more per hour!
> Vote to give yourself a raise on Friday!

The second also suggested that the employees might lose the proposed increases if they looked to District 1199. This flyer told the reader, in pertinent part:

> There are no guarantees in life
> or in negotiations. . . .

In the third handbill, Americare seemed to be urging the bargaining unit employees to abandon District 1199 and individually accept the wage offer. The message, in pertinent part, was as follows:

> WHAT'S UP ? ? ? ? ? ?
>
> AMERICARE PINE LODGE WANTS TO INCREASE YOUR WAGES 25 TO 50
>
> THE UNION DOES NOT WANT TO ACCEPT THIS GENEROUS OFFER
>
> WHAT'S UP ? ? ? ? ? ?
>
> THROUGH UNION NEGOTIATIONS YOU MAY OR MAY NOT RECEIVE A GENEROUS INCREASE. THE OUTCOME IS NOT KNOWN!
>
> THROUGH AMERICARE PINE LODGE YOU WILL RECEIVE A GENEROUS RAISE THAT IS TRULY DESERVED. THIS IS KNOWN!

In a letter dated August 3, which Americare disseminated to its bargaining unit employees, Vice President Ronilo urged them to vote for the wage proposal. In the same letter, he warned:

> You can choose $.25 and $.50 now or roll the dice in December of 1995. As we have told the Union, we *DO NOT INTEND* to offer such a generous wage increase if we have to bargain in December, 1995.

Twenty-eight bargaining unit employees voted on August 4. They rejected Americare's wage proposal, 22 to 6. On August 7, Administrator Johnson, by memorandum addressed to all employees, withdrew the wage offer.

Between August 25 and September 7 Sherry Johnson received signed copies of a petition which declared that the undersigned employees no longer wished to be represented by District 1199 for the purpose of collective bargaining. Johnson found a total of 39 signatures on the petition copies she received during that period. Johnson recognized the names signed on the petition copies as those of a majority of the 73 bargaining unit employees. However, she did not authenticate the signatures.[11]

By letter dated September 8, Vice President Ronilo advised District 1199 that Americare had ''objective evidence that your Union no longer represents a majority of out employees in the collective-bargaining unit at Americare Pine Lodge Nursing and Rehabilitation Center in Beckley, West Virginia.'' Ronilo's letter went on to announce that accordingly, effective December 7, the expiration date of the collective bargaining Americare would withdraw recognition from District 1199.

On December 8, Sherry Johnson issued a letter to her employees announcing the implementation of Americare's wage offer. Effective at the beginning of the next payroll period, level I classifications would receive a 25-cent hourly wage increase, and level II classifications would receive a 50-cent hourly wage increase. These increases were reflected in wages which the bargaining unit employees received in January 1996.

C. *Analysis and Conclusions*

The major issue presented in these cases is whether Americare bypassed District 1199 and dealt directly with the bargaining unit employees in violation of Section 8(a)(1) and (5) of the Act. In resolving this issue, I note that the Board has found such violations where an employer bypassed its employees' bargaining representative and presented them with a proposed change in conditions of employment without first adequately presenting it to the bargaining representative. *Detroit Edison Co.*, 310 NLRB 564 (1993). I have also looked to the Board's policy expressed in *Allied-Signal, Inc.*, 307 NLRB 752, 753 (1992), as follows:

> It is well settled that the Act requires an employer to meet and bargain exclusively with the bargaining representative of its employees, and that an employer who deals directly with its unionized employees . . . regarding terms and conditions of employment violates Section 8(a)(5) and (1). [Fn. omitted.] As the Board made clear in *Modern Merchandising*, 284 NLRB 1377, 1379 (1987), the question is whether an employer's direct solicitation of employee sentiment over working conditions is likely to erode ''the Union's position as exclusive representative.'' [Citations omitted.]

[11] The parties submitted the petitions along with copies of Internal Revenue Service W-4 forms bearing signatures for comparison with those on the petitions which Sherry Johnson had received. The poor quality of some of the signatures on the W-4 copies and on some of the petitions prevented me from verifying several petition signatures. However, my analysis and conclusions obviated the need for such authentication.

In sum, the Board will find such violations where the employer's conduct erodes or undermines the bargaining representative's role in the bargaining process. I also note that the Board permits employers to communicate to bargaining unit employees ''the reasons for his actions and even for his bargaining objective.'' *Obie Pacific, Inc*., 196 NLRB 458, 459 (1972).

In the instant case, Americare began dealing directly with the bargaining unit employees when it distributed to them copies of its letter of July 5 to District 1199, at the same time it was sending the letter to District 1199.[12] Thus, Americare did not afford District 1199 an opportunity to consider the proposal before setting it before the unit employees.

On July 12, Supervisor Dreama Thomas directly sought employee input on the wage offer set forth in that letter. Thomas again solicited employee input when she asked employee Dorothy Smith's view on the same wage proposal.

As a result of management's meeting with unit employees in Dreama Thomas' office, Americare issued its second proposal on July 28 including provision for an anniversary wage increase. Here was the product of the give-and-take between Americare and the unit employees in Thomas's office. The surfacing of that additional offer suggested to the employees that they did not need District 1199 to obtain concessions from Americare. The letter's assertion that Americare's proposal ''is much more than we will be offering if we have to bargain in December 1995'' would give the bargaining unit employees an incentive to abandon District 1199, or at least press District 1199 to capitulate and accept the proposal.

The solicitation of employee input continued between July 28 and August 4. During that interlude, Sherry Johnson asked employees Smith, Boggs, and Aust what they thought of Americare's wage proposal. Supervisor Nancy Cooper approached employees Aust and Glass and asked them if they would vote for it in the ballotting scheduled for August 4. These episodes of questioning occurred while Americare was distributing its handbills urging the employees to vote for its proposals. In these circumstances, I find that management was trying to find out if its handbills were effective.

During the same period, Johnson issued a memorandum to the bargaining unit employees assuring them that Americare was reoffering its original wage proposal and, in response to employee concern, had added the anniversary proposal. This memorandum urged the employees to give these proposals ''serious thought.'' Again, there was the suggestion that Americare was engaged in a give-and-take with them and that without District 1199, the employees would receive the hourly increases including the anniversary adjustments.

Vice President Ronilo's letter of August 3 to the employees bluntly warns them that if they support District 1199's insistence upon negotiations in December, Americare would retaliate by withdrawing its current proposal and offering something less at the bargaining table. Here, I find an effort to pressure the employees into abandoning District 1199, or at least urging District 1199 to accept Americare's proposals and drop its insistence upon bargaining in December.

Finally, in three handbills which it distributed to the bargaining unit employees between July 28 and August 4, Americare continued its effort to urge them to abandon the collective-bargaining process and District 1199. The strongest message in this trilogy was that dealing through District 1199 could result in no wage increase and that dealing directly with Americare would certainly give the employees ''a generous raise that is truly deserved.''

From the foregoing, I find that Americare violated Section 8(a)(5) and (1) of the Act when it bypassed District 1199 and dealt directly with the collective-bargaining unit employees beginning on July 5 and continuing until August 4. Thus, I find that Americare's attempt to undermine District 1199's bargaining position deprived District 1199 of a fair opportunity to bargain about the wage proposal. Given the extent of Americare's effort, I find it likely that its unlawful conduct reached all of the 73 bargaining unit employees during that period.

Due to its unlawful conduct, Americare was not privileged to withdraw recognition of the District 1199 as of December. Under Board policy ''a withdrawal of recognition must occur in a context free of unfair labor practices.'' *Detroit Edison*, supra at 565. Americare's violations of Section 8(a)(5) and (1) of the Act suggested to the bargaining unit employees that they would obtain certainly obtain wage increases from Americare without District 1199s help. This unlawful conduct interfered with the collective-bargaining process and precluded Americare from claiming a good-faith doubt. Nor did the Act permit Americare to implement its wage proposals in the wake of its unlawful withdrawal of recognition. I find that both its withdrawal of recognition and its implementation of its wage proposals, Americare violated Section 8(a)(5) and (1) of the Act. *Alexander Linn Hospital Assn*., 288 NLRB 103 (1988).

At the hearing, I reserved judgment on Americare's motion to dismiss allegations that Supervisors Pam Meador and Norma Todd dealt directly with employees in violation of Section 8(a)(5) and (1) of the Act. Having reviewed the record, I find no showing that either Meador or Todd questioned employees about or solicited employee support for Americare's contract proposal on wages. Accordingly, I shall recommend dismissal of the allegations that Meador and Todd engaged in such unlawful conduct.

On May 14, 1996, District 1199 filed a written request to withdraw the unfair labor practice charge in Case 9–CA–33647. The General Counsel, by letter, has declared that he has no objection to withdrawal of this charge. Accordingly, I am granting the request to withdraw, and shall order severance and dismissal of the complaint in Case 9–CA–33647.[13]

CONCLUSIONS OF LAW

1. Respondent, Americare Pine Lodge Nursing and Rehabilitation Center, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District 1199, WV/KY/OH, the Health Care and Social Service Union, SEIU, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

[12] The Board has recognized that an employer may lawfully inform bargaining unit employees of its proposals to their bargaining representative, after the representive has rejected it. *United Technologies*, 274 NLRB 609, 610 (1985).

[13] I have received in evidence, as ALJ Exhs. 1A and B, respectively, the withdrawal request and the General Counsel's letter.

3. At all times material to these cases, based on Section 9(a) of the Act, District 1199 has been the exclusive collective-bargaining representative of the following appropriate unit:

> All full-time and part-time service and maintenance employees, employed by [Americare] including nurses aides, restorative aides, physical therapy aides, housekeeping employees, laundry employees, maintenance employees and dietary employees, but excluding all LPNs, administrative personnel, office clerical employees, department heads, activities director, RNs, and other professional employees and all guards and supervisors as defined in the Act.

4. Americare has engaged in violations of Section 8(a)(5) and (1) of the Act by its bypassing of District 1199 and direct dealing with employees in the appropriate unit described above with respect to wages, by its withdrawal of recognition and by unilaterally granting wage increases to bargaining unit employees without affording District 1199 an opportunity to bargain collectively about those increases.

5. Americare by Supervisors Norma Todd and Pam Meador did not violate Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent, Americare, has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Americare Pine Lodge Nursing and Rehabilitation Center, Beckley, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bypassing District 1199, WV/KY/OH, the Health Care and Social Service Union, SEIU, AFL–CIO as the exclusive collective-bargaining representative of its employees in the following appropriate unit, and dealing directly with the employees with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All full-time and part-time service and maintenance employees, employed by Respondent, including nurses aides, restorative aides, physical therapy aides, housekeeping employees, laundry employees, maintenance employees and dietary employees, but excluding all LPNs, administrative personnel, office clerical employees, department heads, activities director, RNs, and other professional employees and all guards and supervisors as defined in the Act.

(b) Withdrawing recognition from, and refusing to bargain with District 1199 as the exclusive collective-bargaining representative of the employees in the appropriate unit described above.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain in good faith with District 1199, WV/KY/OH, the Health Care and Social Service Union, SEIU, AFL–CIO as the exclusive collective-bargaining representative of the employees in following appropriate unit regarding rates of pay, wages, hours of employment, and other terms and conditions of employment for the employees in that unit and, if an understanding is reached, reduce the agreement to writing and sign it:

> All full-time and part-time service and maintenance employees, employed by Respondent, including nurses aides, restorative aides, physical therapy aides, housekeeping employees, laundry employees, maintenance employees and dietary employees, but excluding all LPNs, administrative personnel, office clerical employees, department heads, activities director, RNs, and other professional employees and all guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Beckley, West Virginia, copies of the attached notice marked ''Appendix.''[15] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 6, 1995.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint in Case 9–CA–33647 be severed and dismissed.

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''